No. 91-453

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

DAVID H. LUCAS,
Petitioner,
v.
SOUTH CAROLINA COASTAL COUNCIL,
Respondent.

On Writ of Certiorari to the Supreme Court of South Carolina

BRIEF OF AMICI CURIAE THE AMERICAN MINING CONGRESS, THE NATIONAL COAL ASSOCIATION, THE NATIONAL FOREST PRODUCTS ASSOCIATION, THE AMERICAN FOREST COUNCIL, AND THE AMERICAN FOREST RESOURCE ALLIANCE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether a State may avoid compensating a party for the complete destruction of his settled property rights, on the theory that the Just Compensation Clause contains a "nuisance exception."

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INTERESTS OF THE AMICI CURIAE

The five Amici represented here constitute a broad cross-section of firms that draw on the Nation's natural resources to benefit the American people and the economy. Thus, the National Coal Association is a non-profit trade association representing coal mining companies that own or operate more than 70 percent of the Nation's coal producing capacity. Its members also include other key segments of the industry—coal sellers, equipment suppliers, resource developers, transporters, electric utilities and con-

sultants. The American Mining Congress is a non-profit association comprised of mining companies that produce most of the Nation's minerals, as well as manufacturers of mining equipment, and engineering, financial, and consulting firms serving the mining industry. The National Forest Products Association and the American Forest Council are non-profit organizations whose members account for much of the timber managed and harvested in this country, as well as most of the solid wood products manufactured. Finally, the American Forest Resource Alliance is a coalition of community, labor, housing, industry and other groups with an interest in the timber industry.

Coal is used to generate more than one-half of the electricity consumed on an annual basis in the United States. The mining industry not only produces the vital resources needed to manufacture virtually all commodities sold in domestic and foreign markets, it also provides jobs essential to the Nation's economic health. Mine workers are the highest paid industrial workers in the United States. Similarly, the solid wood and pulp and paper industries supply raw materials that are essential, among other things, to written communication and to the Nation's ability to supply affordable housing for its people. Those industries contribute approximately four percent of total Gross Domestic Product, providing an important source of employment and in some cases the economic foundation of rural communities.

The major purpose of all Amici is to represent those with interests in the Nation's natural resources industries and to work with public officials in formulating public policy affecting those industries. Amici seek to develop policies that will result in the efficient utilization and conservation of natural resources consistent with economic, environmental, safety and other goals.

Because of their stated interests, the present case is of great importance to Amici. This is so for several

reasons. First, as this Court's previous cases have demonstrated, the scope of the Just Compensation Clause of the Fifth Amendment necessarily has a significant impact on the Nation's natural resources industries. *See, e.g., Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987); *Kirby Forest Industries, Inc. v. United States*, 467 U.S. 1 (1984); *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922); *Plymouth Coal Co. v. Pennsylvania*, 232 U.S. 531 (1914). Second, unlike most other commercial activities, the economic viability of these industries depends almost entirely on a vast resource that is subject to continual government regulation. For example, the collective worth of the Nation's private timber reserves is over $400,000,000,000. Accordingly, the extent to which the States may prevent the use of a resource of this magnitude—and do so without compensating these Amici for their substantial investment in such a resource—is of enormous concern.

Finally, because Amici's investments in natural resources are nearly always long-term, and because those investments are continually affected by new regulation based on changing political conceptions of the desirability of various land uses, it is crucial to Amici to have some measure of assurance regarding the safety of their investments. Without such assurance, less investment will necessarily occur. Unfortunately, under the current state of the law, it has become nearly impossible to predict when a court will consider a particular land use regulation to be a "taking." Worse, the decision of the lower court in this case has virtually eliminated what little certainty remains in the law by making the Constitution's just-compensation requirement revocable at will by legislatures.

For all these reasons, Amici are concerned that this Court develop a consistent, predictable approach to the Just Compensation Clause that will permit sensible and

efficient regulation of natural resources and, at the same time, ensure a measure of protection for reasonable investment expectations. The decision of the lower court is completely at odds with these concerns. Accordingly, for the reasons that follow, Amici urge that that decision be reversed.[1]

SUMMARY OF ARGUMENT

According to the lower court, so long as a legislature declares that it is regulating property for the purpose of "prevent[ing] serious public harm," the government need never pay just compensation, even where, as in this case, the regulation totally destroys the economic value of property. Pet. App. 3, 8, 10, 11-12, 16. That is not the law. This Court has repeatedly held that a taking occurs where regulation either does not "substantially advance legitimate state interests, . . . *or* denies an owner economically viable use of his land." *Keystone*, 480 U.S. at 485 (quoting *Agins v. Tiburon*, 447 U.S. 255, 260 (1980)) (emphasis supplied); *see also Nollan v. California Coastal Commission*, 483 U.S. 825, 834 (1987); *Hodel*, 452 U.S. at 296; *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 138 n.36 (1978). This Court should reaffirm that principle here and make explicit that no matter how important the state's asserted interest, that interest cannot justify avoidance of the Constitution's just-compensation requirement where regulation has destroyed all economically viable use of a person's property.

The Court should furthermore reject the proposition that merely by declaring an owner's use of his property to be a "nuisance," the legislature may *ipse dixit* avoid payment of just compensation. Nothing in the Constitution authorizes such avoidance. And nothing in the Constitution provides any standard whatever by which this Court may determine which uses of property are in fact

[1] This brief *amici curiae* is being filed with the consent of the parties, whose written statements of consent have been filed with the Clerk of the Court.

such a "nuisance" that they are not deserving of compensation after a taking. Moreover, the *ad hoc*, after-the-fact recognition of a "nuisance exception" completely undermines a primary purpose of the Just Compensation Clause: encouraging the use and development of property interests through the assured protection of those interests.

Furthermore, it is completely unnecessary for the Court to recognize and attempt to give content to a "nuisance exception" to the Just Compensation Clause. "Property" under that Clause is defined by state law. Accordingly, State legislatures have always had authority, subject to constitutional limitations, to prohibit uses of property that they may now or later consider noxious or a nuisance. However, for owners who acquire their property rights *prior* to such legislative action, the prohibition of further use necessarily regulates an existing "property" right. And where, as here, the regulation totally deprives the owner of all economically viable use, it necessarily constitutes a taking of "property" and, under the plain language of the Constitution, just compensation is mandated. The Court should so hold in this case.

ARGUMENT

I. WHERE A STATE DESTROYS ALL VALUE IN AN OWNER'S PROPERTY, IT MUST PAY JUST COMPENSATION FOR THAT DESTRUCTION

As noted by the lower court, this Court has taken into account several factors in determining whether a taking has occurred. Pet. App. 9. But as the lower court failed to recognize, the two key factors in the Court's analysis have been that land use regulation effects a taking—"if it 'does not substantially advance legitimate state interests, . . . *or* denies an owner economically viable use of his land.'" *Keystone*, 480 U.S. at 485 (quoting *Agins*, 447 U.S. at 260) (emphasis supplied); *see also Nollan*, 483 U.S. at 834; *Hodel*, 452 U.S. at 296; *Penn Central*, 438 U.S. at 138 n.36.

Here, the lower court thought the State's interest so substantial and important that it ignored *all* other factors considered by this Court, including the single factor that has always proved dispositive in the Court's cases—the complete destruction of the value of the owner's property.[2] As Chief Justice Rehnquist pointed out in *Keystone*, even in the so-called "nuisance" cases this Court has *never* approved a refusal to pay compensation where complete deprivation of economic value has occurred. 480 U.S. at 513-14 (Rehnquist, C.J., dissenting).[3]

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[2] The South Carolina Supreme Court did not question the trial court's finding in this case that the property owner lost all economically viable use of his land. Pet. App. 15, 37.

[3] In *United States v. Caltex*, 344 U.S. 149 (1952), this Court held that the government was not required to compensate the owners of oil terminal facilities destroyed to keep them from falling into the hands of an advancing enemy. That result is properly explained by the fact that the property would have been expropriated by the enemy had the government not destroyed it. *Id.* at 153, 155. Thus, the government did compensate the owner for all property that it was able to save and use for its own benefit. *Id.* at 151, 155.

The Court should not depart from these precedents here. Amici submit that where a *total loss* of property has been effectuated, no judicial balancing of interests can alter the fact that a taking of property has occurred or avoid the Constitution's command that just compensation be paid for that taking. We urge the Court to so hold in this case.

II. THE COURTS HAVE NO AUTHORITY—AND NO NEED—TO WRITE A "NUISANCE EXCEPTION" INTO THE JUST COMPENSATION CLAUSE

The Fifth Amendment provides that "private property [shall not] be taken for public use, without just compensation." Here, there is no question that private property has been taken—completely—and that the taking was for public use; nevertheless, the lower court held that payment of just compensation is not required because the taking was designed "to prevent serious public harm." Pet. App. 3, 8, 10, 11-12, 16.

It is submitted that nothing in the Constitution authorizes this so-called "nuisance exception" to the just-compensation requirement. The Fifth Amendment could have provided that where the "public use" sought to be served was particularly compelling—as where the expected benefit was great or the expected harm severe—compensation need not be paid. But that is *not* what the Constitution provides. Its command for just compensation is categorical. It is submitted, therefore, that what this Court held nearly 70 years ago on this issue should control the outcome here: "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pennsylvania Coal*, 260 U.S. at 416.[4]

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[4] As this Court has more recently held, even a "public purpose of high order" will not insulate government from compliance with the just-compensation requirement. *See Hodel v. Irving*, 481 U.S. 704, 712 (1987).

In addition to the fundamental requirement that the plain language of the Constitution be followed, it is submitted that there are at least three additional reasons why the so-called nuisance exception should not be accepted by the Court. First, there is simply no principled guidance in the Constitution for such an exception. Once the courts begin making exceptions to the just-compensation requirement, by what standard will they grant or deny the exception? How great must the nuisance be? [5] How severe the harm? How large the expected benefit? [6] In other words, when does a taking that is a "mere" legitimate exercise of the police power—and is therefore compensable—cross the line and become such a "super" exercise of that power that the courts may deem the taking noncompensable?

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[5] It is not at all clear what a nuisance actually is, much less how its definition should be constitutionalized. As the authors of a leading text on torts have written: "There is perhaps no more impenetrable jungle in the entire law than that which surrounds the word 'nuisance.' . . . There is general agreement that it is incapable of any exact or comprehensive definition. Few terms have afforded so excellent an illustration of the familiar tendency of the courts to seize upon a catchword as a substitute for any analysis of a problem; the defendant's interference with the plaintiff's interest is characterized as a 'nuisance,' and there is nothing more to be said." W. Page Keeton, *et al., Prosser and Keeton on the Law of Torts* § 86 at 616-17 (5th ed. 1984).

[6] Advocates of an "exception" to the just-compensation requirement would argue, of course, that there is no reason to limit the exception to preventions of great public *harm*. Creations of great public *benefit* ought also to qualify. After all, avoidance of an injury is by definition a benefit; and failure to obtain a benefit may itself be regarded as an injury. As Justice Brennan wrote in *Penn Central*, the so-called "nuisance" cases rest "not upon any supposed 'noxious' quality of the prohibited uses but rather on the ground that the restrictions were reasonably related to the implementation of a policy . . . *expected to produce a widespread public benefit* . . . ." 438 U.S. at 134 n.30 (emphasis supplied). Under that standard, the "nuisance exception" is completely without definable limits, to say nothing of being without constitutional foundation.

The answer is that the courts have no basis for drawing the line because under the Constitution there is no such line. For this reason alone, the courts should not be required to wrestle further with the scope and application of the nuisance exception. This Court should now say clearly that the exception does not exist—because the Constitution does not provide for it.

There is a further reason—one of great interest to Amici—why the Court should expressly disavow the claimed nuisance exception: to ensure stability of property rights in our economy. It has long been settled that the Just Compensation Clause was designed to ensure the protection of property rights created under state law. *See, e.g., Pumpelly v. Green Bay Co.*, 80 U.S. (13 Wall.) 166, 177-78 (1872). The present decision completely undermines this purpose and, at the same time, creates significant disincentives for those considering investing in any regulated sectors of our economy. For under the present decision, a State may not only decide, after the fact, that those who have invested millions in developing a project designed to serve the public interest are no longer serving that interest; but more importantly, the State may also declare, again after the fact, that in its view the investment has become so out of keeping with the public interest that it may be totally destroyed without compensation.

These Amici do not challenge the State's power to continuously restrike the balance between, say, environmental concerns and natural resource needs, provided that power is not exercised arbitrarily or irrationally. But Amici strenuously deny that the State has the option under the Constitution to strike the balance against natural resource needs, require the total destruction of property these Amici have committed to those needs, and do so without paying just compensation. Not only is such a result contrary to the Constitution, it is also directly contrary to the public interest. For if government becomes

authorized to retroactively destroy property rights in such fashion without paying compensation therefor, significant disincentives to investment in natural resources (as well as in other important national needs) will inevitably result. In the long run, the public will be the loser from any short-term compensation savings.

Finally, there is in any event *no need* for the Court to recognize and take upon itself the responsibility for designing the contours of a nuisance exception. This is because, as with the Due Process Clause, the definition of "property" under the Just Compensation Clause is a matter of state law, while the question whether a "taking" has occurred is a matter of federal constitutional law. *See, e.g., Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1001-04 (1984) (taking occurred where plaintiff had trade secret property right under Missouri law); *Pennsylvania Coal*, 260 U.S. at 414 (taking occurred where mining company had subsidence right under Pennsylvania law); *cf. Board of Regents v. Roth*, 408 U.S. 564, 577 (1972) ("property" interests protected by Due Process Clause are not created by the Constitution; they are created and defined by rules that stem from an independent source such as state law).

Thus, subject to constitutional limitations, the legislature is already authorized to prevent detrimental uses of property and to change its mind about what uses are detrimental. When the legislature prohibits a particular land use and land is *thereafter* acquired, no "property" is "taken" with respect to the prohibited use because no cognizable "property" interest exists within the meaning of the Takings Clause. *See United States v. General Motors Corp.*, 323 U.S. 373, 377-78 (1945) ("property" as used in Takings Clause denotes "the group of rights inhering in the citizen's relation to the physical thing"). However, as to an owner who acquired his rights *prior* to the prohibition, the prohibition would necessarily extinguish an *existing* property right and, where the prohibition deprives the owner of all economically viable use, it effects a taking of his property.[7]

This approach to the nuisance problem accords with the language of the Constitution, removes the courts from the business of creating *ad hoc* nuisance exceptions for which no standards exist, and protects the settled property rights of parties, like Amici, with long-held vested interests backed by significant investment expectations. The Court should therefore require that South Carolina adopt it. Because that approach was plainly not followed here; because, instead, the State claimed authority to work a retroactive, total deprivation of *existing* property rights without payment of just compensation, the decision below should be reversed.

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[7] Amici recognize, based upon their own experience, that the nature of land use regulation is often such that it is not clear (as it is in this case) whether property rights were acquired before or after the effective date of a prohibition on use. In cases of ambiguity, the government's obligation to pay just compensation depends, under this Court's precedents, upon the reasonableness of the owner's investment-backed expectations at the time he acquired his interest and made his investment. *See, e.g., Ruckelshaus*, 467 U.S. at 1005-14.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the South Carolina Supreme Court.

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